

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Unknown Parties, et al.,

Plaintiffs,

v.

Jeh Johnson, et al.,

Defendants.

No. CV-15-00250-TUC-DCB

ORDER

This is a class action lawsuit brought by detainees held in United States Border Patrol facilities within the Border Patrol's Tucson Sector, who allege constitutional violations involving deprivation of water, food, basic sanitary necessities, adequate space, sleeping accommodations, and the existence of conditions that preclude sleep such as cold temperatures and blaring lights.

On September 2, 2015, the parties stipulated to a Protective Order (Doc. 68), which, as summarized by Defendants, covers: "materials that contain[] personally identifiable information that is protected under the Privacy Act or other law, and 'records regarding law enforcement activities and operations, internal policies, processes and procedures, training materials, and internal investigations which contain information that is law enforcement sensitive'" (Partial Motion to Seal (Doc. 101) at 3 (citing Protective Order ¶ 2)). "The Protective Order also protects copies, extracts, and summaries prepared from materials designated as Protected Materials, and 'portions of briefs, memoranda, or any other writings *filed with the Court and exhibits thereto* that

1 contain, summarize, or reflect the content of any such documents, things, or
2 information.”” *Id.* (citing Protective Order ¶ 12)) (emphasis added).

3 On December 4, 2015, Plaintiffs filed a Motion for a Preliminary Injunction (Doc.
4 76), with 203 attached exhibits. The parties are at odds regarding the partial sealing and
5 redaction of the motion and exhibits, pursuant to the Protective Order. *See* (Motion to
6 Partially Seal Re: Motion for Preliminary Injunction (MPS:MPI) (Doc. 101)).
7 Consequently, all the documents related to the Plaintiffs’ Motion for Preliminary
8 Injunction have been filed, temporarily, under seal. Without any objection from the
9 parties, the Phoenix Newspapers, Inc., seeks to intervene to oppose the Defendants’
10 Partial Motion to Seal. (Motion to Intervene (Doc. 124)). The Court, accordingly,
11 considers the Intervenor Phoenix Newspapers’ arguments in deciding the Defendants’
12 Partial Motion to Seal related to Plaintiffs’ Motion for Preliminary Injunction.
13 Defendants also filed a similar Motion to Partially Seal its Response to the Motion for
14 Preliminary Injunction. (Motion to Partially Seal Re: Response to MPI (MPS:Response)
15 (Doc. 139)).

16 Plaintiffs’ Motion for Preliminary Injunction (Doc. 76), includes the following:
17 Exs. 1-9 (Doc. 77); Exs. 10-18 (Doc. 78); Exs. 19-24 (Doc. 79); Exs. 25-27 (Doc. 80);
18 Exs.28-31 (Doc. 81); Ex. 32-42 (Doc. 82); Exs. 43-50 (Doc. 83); Exs. 51-59 (Doc. 84);
19 Exs. 60-69 (Doc. 85); Exs. 70-80 (Doc. 86); Exs. 81-87 (Doc. 87); Exs. 88-103 (Doc.
20 88); Exs. 104-105 (Doc. 89); Exs. 106-116 (Doc. 90); Exs. 117-146 (Doc. 91); Exs. 147-
21 171 (Doc. 92), and Ex. 172-203 (Doc. 93).

22 Defendants’ Motion to Seal and Partial Notice of Withdrawal of Confidentiality
23 Designation (MPS:MPI), seeks to seal the following Exhibits: 81, 84, 85, 87, 96, 103,
24 117, 119-126, 128-131, 133-188, 190, 191, and 203. Defendants seek to have Plaintiffs’
25 file a redacted version of the Motion for Preliminary Injunction, (Doc. 76), and the
26 supporting declarations, (Doc. 76-2-6), and Exhibits 5, 6, 48, 78, 79, 80, 82, 83, 86, 88,
27 94, 97-99, 104-116, and 118. Defendants withdraw Protected-Material objections it had
28 to Exhibits 1-4, 7-47, 49-77, 89-93, 100, 127, 132, and 189. And Defendants note, the

1 remainder of the exhibits were never designated as Protected Materials: Exhibits 95, 101,
2 102, 192-202. (MPS:MPI (Doc. 101) at 2-3.)

3 Without further discussion, the Court will unseal the following documents: Doc.
4 77, Exs. 1-4 and 7-9; Doc. 78; Doc. 79; Doc. 80; Doc. 81; Doc. 82; Doc. 83, Exs. 43-47
5 and 49-50; Doc. 84; Doc. 85; Doc. 86, Exs. 70-77; Doc. 88, Exs. 89-93, 95 and 100-102;
6 Doc. 91, Exs. 127 and 132, Doc. 93, Exs. 189 and 192-202.

7 The Court finds that the Protective Order is limited to materials that contain
8 “personally identifiable information that is protected by the Privacy Act and other law”
9 and “records regarding law enforcement activities which contain information that is law
10 enforcement sensitive.” (Partial Motion to Seal (Doc. 101) at 3 (citing Protective Order ¶
11 2)).

12 The Court notes that protective orders, entered pursuant to Fed. R. Civ. P. 26, are
13 aimed at protecting discovery documents. “Generally, the public can gain access to
14 litigation documents and information produced during discovery unless the party
15 opposing disclosure shows ‘good cause’ why a protective order is necessary.” *Phillips ex*
16 *rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). “It is
17 well-established that the fruits of pre-trial discovery are, in the absence of a court order to
18 the contrary, presumptively public. Rule 26(c) authorizes a district court to override this
19 presumption where ‘good cause’ is shown.” *San Jose Mercury News, Inc. v. United*
20 *States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir.1999). Under Rule 26(c): “Upon motion
21 by a party or by a person from whom discovery is sought ... and for good cause shown,
22 the court in which the action is pending ... may make any order which justice requires to
23 protect a party or person from annoyance, embarrassment, oppression, or undue burden
24 or expense,” including eight expressly styled orders.

25 Generally, the Court “will not enter an order that gives advance authorization to
26 file documents under seal that are designated for treatment by parties under a protective
27 order or confidentiality agreement.” LRCiv 5.6(b). Nevertheless, the Court did just that
28 in this case, pursuant to the parties’ stipulation. “Because the parties [] simply stipulated

1 to the protective order, a particularized showing of “good cause” to keep the documents
2 under seal has[] never been made to the court as required by Federal Rule of Civil
3 Procedure 26(c).” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1176 (9th Cir.
4 2006). To seal the documents at issue now, the burden of showing good cause is on the
5 party seeking to keep the information and/or documents confidential. *Id.*

6 The Defendants assert there is good cause to seal the exhibits in whole and/or in
7 part by redaction. Plaintiffs assert that good cause is an insufficient standard for sealing
8 these documents, which are now part of the court record. Plaintiffs argue that the
9 Defendants cannot rely on the Protective Order because there is a common law right of
10 access to judicial documents which requires compelling reasons to overcome the “strong
11 presumption in the Ninth Circuit favoring access to public records, which is justified by
12 the interest of citizens in keeping a watchful eye on the workings of public agencies.”
13 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *Kamakana*,
14 447 F.3d at 1178 (internal citation & quotation omitted).

15 There is, however, an exception to the presumption of access to judicial records
16 “carved out,” *Foltz*, 331 F.3d at 1135, for a “*sealed discovery document* [attached] to a
17 *non-dispositive motion*,” such that “the usual presumption of the public's right of access
18 is rebutted.” *Phillips*, 307 F.3d at 1213 (emphasis added). The reasoning for
19 distinguishing between *dispositive and non-dispositive motions*” is because records
20 attached only to non-dispositive motions are often ““unrelated, or only tangentially
21 related, to the underlying cause of action.”” *Foltz*, 331 F.3d at 1135. The public policies
22 that support the right of access to dispositive motions, and related materials, do not apply
23 with equal force to non-dispositive materials. *Phillips*, 307 F.3d at 1213. Then, a
24 particularized showing under the good cause standard of Rule 26(c) will suffice.
25 *Kamakana*, 447 F.3d at 1179-80 (relying on *Foltz* and *Phillips*).

26 Until January 11, 2016, the day the Defendants filed the Reply, the applicable
27 standard, good cause or compelling reason, was a debatable question. On that day, the
28 Ninth Circuit Court of Appeals answered it. In *Center for Auto Safety v. Chrysler Group*

1 *LLC*, 809 F.3d 1092, 1098 (9th Cir. 2016), the Ninth Circuit rejected the
 2 dispositive/nondispositive distinction for determining the standard: good cause or
 3 compelling reason. It clarified that the focus of the inquiry is on “whether the motion at
 4 issue is more than tangentially related to the underlying cause of action.” *Id.* at 1099. Of
 5 course dispositive motions will always require a compelling reason to warrant
 6 nondisclosure because they go to the merits of the case. But also, the court noted, there
 7 are many nondispositive motions, including routine motions in limine, which are strongly
 8 correlative to the merits of the case. *Id.*

9 The preliminary injunction at issue in *Chrysler* was found to be such a motion, and
 10 the case was remanded for the district court to apply the compelling reasons standard to
 11 the question of unsealing documents attached to the parties’ memorandums supporting or
 12 opposing plaintiffs’ motion for a preliminary injunction. The preliminary injunction
 13 sought in *Chrysler* was like the preliminary injunction sought by the Plaintiffs in this
 14 case. It attacked the status quo. Generally, a preliminary injunction seeks to retain the
 15 status quo, but in *Chrysler* and here, plaintiffs seek to alter it. *Id.* at 1102. *See* (Response
 16 to MPI (Doc. 133) at 3-4 (describing Plaintiffs’ motion as Motion for Mandatory
 17 Preliminary Injunction). Following *Chrysler*, this Court must reject Defendants’
 18 dispositive/nondispositive motion distinction. Plaintiffs’ prevail, and Defendants must
 19 present compelling reasons to seal these documents because the Motion for Preliminary
 20 Injunction is not tangential to, instead it goes directly to, the merits of the case.

21 Common Law Right of Access: Compelling Reasons

22 Under the compelling reasons standard, the starting point is the strong
 23 presumption in favor of access.¹ *Kamakana*, 447 F.3d at 1178 (citing *Foltz*, 331 F.3d at
 24 1135). A party seeking to seal a judicial record bears the burden of overcoming this
 25 strong presumption by meeting the “compelling reasons” standard. *Id.* That is, the party

26
 27 ¹ A narrow range of documents is not subject to the right of public access at all
 28 because the records have “traditionally been kept secret” for important policy reasons:
 grand jury transcripts and warrant materials in the midst of a pre-indictment
 investigation. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)

1 must “articulate[] compelling reasons supported by specific factual findings.” *Id.* (citing
 2 *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102–03 (9th Cir.1999)).
 3 In other words, the presumption of access may be overcome only “on the basis of
 4 articulable facts known to the court, not on the basis of unsupported hypothesis or
 5 conjecture.” *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995).

6 Relevant factors for determining whether the strong presumption of access is
 7 overcome include the public interest in understanding the judicial process and whether
 8 disclosure of the material could result in improper use of the material, such as to gratify
 9 private spite or for scandalous or libelous purposes, or to release trade secrets.
 10 *Kamakana*, 447 F.3d at 1179 (citing *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th
 11 Cir.1990)), *Valley Broadcasting Co. v. United States District Court, District of Nevada*,
 12 798 F.2d 1289, 1294 (9th Cir. 1986)). “The mere fact that the production of records may
 13 lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not,
 14 without more, compel the court to seal its records.” *Id.*

15 “[T]he interest in access to court proceedings in general may be asserted more
 16 forcefully when the litigation involves matters of significant public concern.” *Cohen v.*
 17 *Trump*, 2016 WL 3036302 * 6 (May 27, 2016) (quoting *In re Coordinated Pretrial*
 18 *Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 38 (Calif. 1984))
 19 (describing heightened public interest in litigation charges that international collusion
 20 among world’s largest enterprises to raise and stabilize retail prices of gasoline was a
 21 substantial cause of gasoline shortages experienced in this country and affecting the lives
 22 of all Americans), *see also*, *In re Roman Catholic Archbishop of Portland in Oregon*,
 23 661 F.3d 417, 428 (9th Cir. 2011) (describing weighty public interest in safety and
 24 knowing who might sexually abuse children in context of deciding whether to seal or
 25 redact names of alleged child-predator priests).

26 In this case, Plaintiffs charge the United States Government with treating people
 27 inhumanely. *Cf.*, *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59,
 28 87-88 (2nd Cir. 2008), *reversed on other grounds*, 558 U.S. 1042 (2009) (Freedom of

1 Information Act (FOIA) case, noting significant public interest in disclosure of Abu
2 Ghraib photographs because they yield evidence of governmental wrongdoing and the
3 law accords a special importance to information revealing official misconduct—“vital to
4 the functioning of a democratic society, needed to check against corruption and to hold
5 the governors accountable to the governed.” (quoting *National Labor Relations Board v.*
6 *Robbins Tire and Rubber Company*, 437 U.S. 214, 242 (1978)). The Court finds there is a
7 weighty public interest in the disclosure of the record in this case.

8 After considering these competing interests, if the court decides to seal certain
9 judicial records, it must “base its decision on a compelling reason and articulate the
10 factual basis for its ruling, without relying on hypothesis or conjecture.” *Hagestad*, 49
11 F.3d at 1434. Therefore, the Defendants must make a particularized showing for
12 documents it seeks to seal or redact giving articulable compelling reasons supported by
13 specific factual findings that outweigh the important public policies favoring disclosure
14 of that document. *Kamakana*, 447 F.3d at 1178, 1180-81. It is not enough to make
15 blanket claims of privacy or law enforcement. *Id.* at 1185. Defendants must demonstrate
16 specific prejudice or harm flowing from the disclosure of a specific document. *Id.* at
17 1186.

18 The Defendants have not provided the type of particularized arguments for non-
19 disclosure. Instead, “Defendants move to seal these documents on three separate
20 grounds: 1) some of the documents reveal images of individuals in Border Patrol custody,
21 the public disclosure of which could violate the privacy rights of those individuals; 2)
22 some of the documents contain information that, if publicly released, would raise security
23 concerns, and could impede the law enforcement mission of Tucson Sector Border Patrol;
24 and 3) some of the documents contain personally identifiable information for Border
25 Patrol agents and employees which is not necessary for resolution of the case, and which
26 if publicly released could affect the privacy interests of those individuals.” (MPS:MPI at
27 2-3.) These three grounds can only be described as broad, blanket, reasons for non-
28 disclosure, but then Defendants provide a chart professing to articulate the reason for

1 nondisclosure of each specific document. The chart describes these sub-reasons, again,
 2 blanket terms: 1) Privacy Concerns: made in regard to approximately 71 images of
 3 detained individuals, public release may enable unauthorized identification in potential
 4 violation of individual privacy rights; 2) Security: risk of unauthorized access, risk of
 5 escape, reveals monitoring capabilities, cell capacity information may be used to target
 6 and overwhelm particular stations or operating areas, or if related to the e3DMsystem-
 7 then “information could be used to circumvent Border Patrol’s normal processing and
 8 procedures and to impede law enforcement operations;² 3) Agent Privacy: redaction of
 9 agent and employee names to protect law enforcement agent for lack of relevancy.

10 Because the Defendants have submitted only good cause for sealing these
 11 documents, the Court must call for additional briefing. “‘Good cause’ *without more* will
 12 not satisfy a ‘compelling reasons’ test.” *Kamakana*, 447 F.3d at 1184 (citing *Foltz*, 331
 13 F.3d at 1135-36)). Except, the Court finds no good cause to seal pictures for privacy
 14 reasons because the Plaintiffs blanked out the entirety of the faces and the individuals are
 15 unrecognizable. Without further discussion, the Court rejects Defendants’ privacy
 16 objections to the following exhibits: Exs. 1-9 (Doc. 77); Exs. 10-18 (Doc. 78); Exs. 19-24
 17 (Doc. 79); Exs. 25-27 (Doc. 80); Exs. 28-31 (Doc. 81); Ex. 32-42 (Doc. 82); Exs. 43-50
 18 (Doc. 83); Exs. 51-59 (Doc. 84); Exs. 60-69 (Doc. 85); Exs. 70-80 (Doc. 86); Exs. 81-87
 19 (Doc. 87); Exs. 88-103) (Doc. 88); Exs. 104-105 (Doc. 89); Exs. 106-116 (Doc. 90); Exs.
 20 117-146 (Doc. 91); Exs. 147-171 (Doc. 92), and Ex. 172-203 (Doc. 93).

21 Without asserting good cause, the Government seeks redaction of Exhibit 97 “out
 22 of an abundance of caution under 8 U.S.C. § 1367.” The Government seeks to redact
 23 information contained on a form in a column captioned “Action,” consisting in large part
 24 of acronyms which are meaningless to the Court. The statute relied on by the
 25 Government to support the redaction pertains to violence against women. The exhibit
 26 does not contain any identifying information for any specific detainee. The Defendants

27
 28 ² It appears that Defendants are withdrawing this objection, at least in part, (D’s
 Reply to MPS:Response at 2-13), but these parts are not identified.

1 offer no explanation of good cause for the proposed “privacy concern” redaction to
2 Exhibit 97. The Court finds no compelling reason to redact Exhibit 97.

3 Like the privacy reasons offered by Defendants for nondisclosure, the Court finds
4 no good cause, and therefore no compelling reason, for redacting the names and/or badge
5 numbers of agents. There are five such objections to disclosure: Exhibits 82, 83, 86, 104-
6 116, and 118. In documents 82, 83, and 86, the proposed redacted names are the Chief,
7 Assistant Chief, and other agents having administrative responsibilities over the
8 operations being challenged here by the Plaintiffs. The agents named in documents 104-
9 116 are those who conducted the cell inspections and filled out the corresponding
10 checklists. Again, the cell conditions are at the heart of this case. Document 118 is a
11 purchase order for protective hoods.

12 The Court agrees that there is little relevance to these names, and where a name is
13 private or sensitive it may be sealed. *Hunter v. City and County of San Francisco*, 2013
14 WL 2319064 *2 (Calif. 2013). But while “individuals, including government employees
15 and officials, have privacy interests in the dissemination of their names,” *Massey v. FBI*,
16 3 F.3d 620, 624 (2d Cir.1993) (citing *Federal Labor Relations Auth. v. United States*
17 *Dep’t of Veterans Affairs*, 958 F.2d 503, 510-11 (2d Cir.1992); *Kuzma v. Internal*
18 *Revenue Serv.*, 775 F.2d 66, 69 (2d Cir.1985)), disclosure “do[es] not always present a
19 significant threat to an individual’s privacy interest. Instead, whether the disclosure of
20 names of government employees threatens a significant privacy interest depends on the
21 consequences likely to ensue from disclosure.” *Wood v. FBI*, 432 F.3d 78, 88 (2nd Cir.
22 2005) (citing *United States Dep’t of State v. Ray*, 502 U.S. 164, 177, n.12 (1991) (internal
23 citation omitted)). Here, however, there is not the usual concern that accompanies the
24 release of an agent’s name in the context of a criminal or national security investigation
25 which would override the public benefit of the disclosure. *Landano v. United States*
26 *Department of Justice*, 956 F.2d 956 F.2d 422, 430–31 (1992), *reversed on other*
27 *grounds*, 508 U.S. 165, 181 (1993). The Chief and Assistant Chief, as decision-makers,
28 signed various memoranda pertaining to the operation of the Border Patrol stations,

1 pursuant to e3DM. The individual agents who conducted the cell reviews completed and
2 signed the e3DM daily check-sheets. Defendants do not submit that disclosure of the
3 names on the administrative memos or on the cell checklists are sensitive. The Court
4 finds that both the relevancy and privacy interests in disclosing these names are de
5 minimis. The strong presumption for disclosure wins out because there is no good cause,
6 and therefore no compelling reason, for redacting the agents' names from Exhibits: 82,
7 83, 86, 104-116.

8 The purchase order, Exhibit 118, is different. It contains private information such
9 as telephone numbers and accounting data, which Plaintiffs admit have no relevancy in
10 the case. This information may be redacted from Exhibit 118.

11 What remains are Defendants' assertions of security and law enforcement reasons
12 for nondisclosure of exhibits which strike close to the heart of this case. Because the
13 burden rests on the party asserting nondisclosure,³ the Court will afford the Defendants
14 an opportunity to present compelling reasons to redact the Motion for Preliminary
15 Injunction (Doc. 76), and the supporting declarations, (Doc. 76-2-6), and to seal or
16 partially redact Exhibits: 5, 6, 48, 78-83, 84-88, 94, 96, 98-99, 103, 117, 119, 147, 167,
17 170-172, and 186-187.

18 **Accordingly,**

19 **IT IS ORDERED** that the Motion by the Phoenix Newspapers to Intervene for
20 the sole purpose of briefing this question (Doc. 124) is GRANTED.

21 **IT IS FURTHER ORDERED** that the MPS:MPI (Doc. 101) is DENIED IN
22 PART as follows: the Clerk of the Court shall unseal Documents 78, 79, 80, 81, 82, 85,

23 ³ Given this burden, the Court finds the Protective Order provision is problematic, which
24 requires any party filing any paper containing information that has been designated
25 Protected Material to request it be filed under seal. The Court will not apply this
26 provision to the parties' dispositive motions or this Motion for Preliminary Injunction.
27 Instead, the parties are encouraged to resolve questions of nondisclosure as much as
28 possible prior to filing motions going to the merits of the case, but in the event there is no
agreement, the documents may be filed under seal, initially, to afford the party seeking
nondisclosure an opportunity to show a compelling reason to seal any specific document.
See Amarel v. Connell, 1102 F.3d 1494, 1515-1516 (9th Cir. 1996) (pretrial orders and
rulings are subject to modification by a district judge at any time prior to final judgment).


89, and 90.

IT IS FURTHER ORDERED that Defendants shall have 14 days from the filing date of this Order to supplement its MPS:MPI (Doc. 101) to show compelling security reasons to seal or partially seal by redaction the Motion for Preliminary Injunction (Doc. 76) and the supporting declarations (Doc. 76-2-6) and Exhibits 5, 6, 48, 78-83, 84-88, 94, 96, 98-99, 103, 117, 119, 147, 167, 170-172, and 186-187.

IT IS FURTHER ORDERED that within 14 days of the filing date of this Order, the Plaintiffs shall supplement Defendants' MPS:Response (Doc. 139) to show compelling reasons for their requested non-disclosures related to Defendants' Response to the Plaintiff's Motion for Preliminary Injunction (Doc. 133) and Exhibit 5 (Doc. 141), and thereafter the Plaintiffs may supplement their Response (Doc. 150), and Defendants' may supplement the Reply (Doc. 151).

IT IS FURTHER ORDERED that there being no objection, the Plaintiffs' Request for taking Judicial Notice of Chief Oaks Declaration in *Flores v. Lynch*, CV 85-4544 RJK-PHX (Doc. 94) is GRANTED.

Dated this 22nd day of June, 2016.



David C. Bury
United States District Judge